

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY LEE WOLF,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41457

FILED

SEP 22 2004

ORDER OF AFFIRMANCE

JANEITE M. BROWN
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is a proper person appeal from an order of the district court denying appellant Gregory Wolf's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

On December 10, 1997, the district court convicted Wolf, pursuant to an Alford plea,¹ of three counts of sexual assault on a minor under fourteen years of age. In exchange for Wolf's plea, the State agreed to dismiss thirty-nine charges against him, as well as refrain from seeking an additional thirty-count indictment. The district court sentenced Wolf to serve three consecutive terms of life in the Nevada State Prison with the possibility of parole. Wolf subsequently filed a motion to withdraw his guilty plea in the district court. The district court concluded that Wolf's plea was knowingly and voluntarily entered, and denied the motion. This court dismissed Wolf's consolidated appeal from his judgment of conviction

¹See North Carolina v. Alford, 400 U.S. 25 (1970).

and the order of the district court denying his motion to withdraw his guilty plea.² The remittitur issued on October 17, 2000.

On October 5, 2001, Wolf filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. The district court appointed counsel to represent Wolf, and counsel filed a supplement. On February 3, 2003, Wolf filed a proper person supplement to his petition. On October 29, 2003, the district court conducted a limited evidentiary hearing and subsequently denied Wolf's petition. This appeal followed.

In his petition, Wolf first claimed that his guilty plea was not knowingly and voluntarily entered. A guilty plea is presumptively valid, and Wolf carries the burden of establishing that his plea was not entered knowingly and intelligently.³ In determining the validity of a guilty plea, this court looks to the totality of the circumstances.⁴ This court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.⁵

²Wolf v. State, Docket Nos. 31528, 33313 (Order Dismissing Appeal, August 11, 2000).

³Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

⁴State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.

⁵Hubbard, 110 Nev. at 675, 877 P.2d at 521.

Wolf claimed that his guilty plea was unknowing and involuntary because he was not aware of the dates the offenses were alleged to have been committed. Wolf contended that he did not read the written guilty plea agreement, and he would not have pleaded guilty if he had noticed the dates contained in the amended indictment. We conclude that Wolf failed to establish that, under the totality of the circumstances, his guilty plea was unknowingly entered. The amended indictment was attached to the written guilty plea agreement and provided that Wolf committed the offenses between January 1993 and June 1995. During the oral plea canvass, Wolf acknowledged that he read, understood, and signed the guilty plea agreement. Thus, Wolf's claim that he did not read the plea agreement is belied by the record.⁶ As such, Wolf's claim is without merit, and we affirm the order of the district court with respect to this claim.

Next, Wolf raised numerous claims of ineffective assistance of trial counsel.⁷ To state a claim of ineffective assistance of trial counsel sufficient to invalidate a guilty plea, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness.⁸

⁶See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

⁷To the extent that Wolf raised any of the following claims independently from his ineffective assistance of counsel claims, we note that it is outside the scope of a post-conviction petition for a writ of habeas corpus. See NRS 34.810(1)(a).

⁸See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

A petitioner must further establish "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."⁹ The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.¹⁰ The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.¹¹

First, Wolf claimed that his trial counsel was ineffective for failing to challenge the grand jury indictment. Specifically, Wolf argued that the district attorney withheld exculpatory evidence from the grand jury.¹² We have reviewed the allegedly exculpatory evidence, and conclude that Wolf failed to establish that it would have explained away the charges, such that his counsel was ineffective for failing to raise this claim. Wolf further argued that the district attorney made highly inflammatory opinion statements during the grand jury proceedings and suborned perjury. We conclude that these claims are similarly without merit, and Wolf therefore failed to demonstrate that his counsel acted unreasonably in failing to challenge the grand jury indictment on these

⁹Hill v. Lockhart, 474 U.S. 52, 59 (1985); see also Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

¹⁰Strickland, 466 U.S. at 697.

¹¹Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

¹²See NRS 172.145.

grounds. Consequently, we affirm the order of the district court with respect to these claims.

Second, Wolf contended that his trial counsel was ineffective for failing to reveal exculpatory evidence to him until after he entered his plea.¹³ This favorable evidence pertained to the three counts to which Wolf pleaded guilty.¹⁴ Wolf argued that if he had been aware of this evidence, he would not have pleaded guilty and would have insisted on going to trial. We have reviewed the evidence that Wolf alleged his counsel failed to inform him of, and conclude that Wolf did not establish that he was prejudiced. In exchange for Wolf's guilty plea, the State dismissed thirty-nine charges against him, and agreed not to seek an additional thirty-count indictment. As such, Wolf failed to satisfactorily demonstrate that he would have proceeded to trial on the full forty-two count indictment—and faced the possibility of a second indictment—if only his counsel had disclosed this evidence to him. Thus, Wolf did not establish that his counsel was ineffective, and the district court did not err in denying this claim.

¹³To the extent that Wolf challenged the voluntariness of his guilty plea based on this or any of the following allegations, we conclude that Wolf failed to demonstrate that under the totality of the circumstances, his guilty plea was not entered voluntarily and knowingly.

¹⁴The evidence of which Wolf complained he was unaware prior to his guilty plea was a medical examination of one of the victims that found no signs of sexual abuse, and police reports that he believed demonstrated that the victims' statements were "unreliable, inconsistent, and uncorroborated."

Third, Wolf alleged that his counsel was ineffective for failing to challenge the fact that he was interrogated by his cellmate, who was a paid police informant. Wolf argued that his counsel was deficient in failing to file a motion to suppress statements he made to his cellmate. We conclude that this claim is without merit. First, Wolf failed to adequately establish that police placed his cellmate with him in order to obtain incriminating statements.¹⁵ Thus, Wolf did not demonstrate that a motion to suppress his statements would have been successful. Moreover, Wolf failed to establish that he would not have pleaded guilty and would have insisted on going to trial if his counsel had filed a successful motion to suppress.¹⁶ Thus, we affirm the order of the district court with respect to this claim.

Fourth, Wolf claimed that his trial counsel was ineffective for failing to request an order authorizing Wolf's use of the telephone. Wolf contended that he was restricted from using the telephone for over six weeks while jailed at the Clark County Detention Center, and this infringed on his ability to communicate with his attorney prior to the entry of his guilty plea. We conclude that Wolf did not establish that he would not have pleaded guilty and would have insisted on going to trial if he had been able to speak with his trial counsel on the telephone. As such,

¹⁵See Boehm v. State, 113 Nev. 910, 944 P.2d 269 (1997).

¹⁶We note that Wolf failed to provide any specific information whatsoever concerning the allegedly incriminating statements he made to his cellmate.

Wolf failed to demonstrate that his counsel was ineffective on this issue, and we affirm the order of the district court with respect to this claim.

Fifth, Wolf claimed that his trial counsel was ineffective for failing to include several arguments in a pre-trial petition for a writ of habeas corpus filed prior to the entry of Wolf's guilty plea. Wolf additionally argued that his counsel was ineffective for failing to file a "bill of particulars." We note that trial counsel filed a pre-trial petition for a writ of habeas corpus on July 9, 1997, in which he raised several challenges to the grand jury indictment. The district court rejected those challenges, however. We conclude that Wolf did not demonstrate that his trial counsel was ineffective for failing to include additional arguments in the habeas petition, as it is unlikely that these claims would have altered the district court's decision. Further, the district court noted that the time period provided in the indictment gave Wolf adequate notice, and Wolf did not establish that his counsel acted unreasonably in failing to file a "bill of particulars." Consequently, the district court did not err in denying this claim.

Sixth, Wolf alleged that his trial counsel was ineffective for failing to file a motion to sever counts one through twenty-three from the remaining counts of his indictment. We conclude that this claim is without merit. This court has held that, "[i]f . . . evidence of one charge would be cross-admissible in evidence at a separate trial on another charge, then both charges may be tried together and need not be

severed."¹⁷ During the evidentiary hearing, Wolf's trial counsel testified that he did not file a motion to sever the charges because he believed they would have been cross-admissible at separate trials.¹⁸ This was a reasonable tactical choice, and as such was entitled to deference.¹⁹ Therefore, Wolf did not establish that his counsel was ineffective on this issue, and we affirm the order of the district court with respect to this claim.

Seventh, Wolf contended that his trial counsel was ineffective for failing to file a variety of pre-trial motions. We conclude that Wolf failed to demonstrate that these motions would likely have been successful, such that he would have insisted on going to trial on forty-two counts, rather than pleading guilty to three. Consequently, Wolf did not establish that his counsel was ineffective in this area, and the district court did not err in denying the claim.

Eighth, Wolf alleged that his trial counsel was ineffective for failing to have the victims undergo a psychological evaluation. Wolf's trial counsel testified during the evidentiary hearing that he did not believe that a psychologist would have been able to refute the physical evidence—audiotapes, videotapes, and photographs of the victims—that the State possessed. The district court's determination that this claim lacked merit

¹⁷Mitchell v. State, 105 Nev. 735, 738, 782 P.2d 1340, 1342 (1989).

¹⁸See NRS 48.045(2).

¹⁹See Riley, 110 Nev. at 653, 878 P.2d at 281-82 (1994).

was supported by substantial evidence, and was not clearly wrong.²⁰ Thus, we affirm the order of the district court with respect to this claim.

Ninth, Wolf claimed that his trial counsel was ineffective for failing to subpoena medical records containing interviews of the victims by health care professionals. Wolf argued that these interviews would have demonstrated that the victims were not being truthful. We conclude that Wolf is not entitled to relief on this claim. Wolf failed to establish that interviews conducted by health care workers would have contained evidence of the victims' untruthfulness, such that he would not have pleaded guilty and would have insisted on going to trial. Consequently, we affirm the order of the district court with respect to this claim.

Tenth, Wolf contended that his trial counsel was ineffective for failing to adequately investigate, research, and interview witnesses. We have examined the various specific claims of error that Wolf raised, and conclude that he did not demonstrate that he would have insisted on going to trial on all forty-two counts of the indictment if his counsel had conducted additional research in these areas. As such, he did not establish that his counsel was ineffective with respect to this claim, and we affirm the order of the district court.

Eleventh, Wolf argued that his trial counsel was ineffective for failing to discuss his case with him. Wolf additionally claimed that his counsel erred in failing to construct an effective defense to the charges. Wolf's trial counsel testified during the evidentiary hearing that he visited

²⁰See *id.* at 647, 878 P.2d at 278.

Wolf multiple times in jail to discuss his case. He further testified that the evidence against Wolf was "overwhelming," and he believed the best defense was to attempt to discredit the witnesses. Because Wolf failed to demonstrate that his trial counsel overlooked a defense that was likely to succeed in light of the substantial physical evidence against him, we conclude that the district court did not err in denying this claim.

Twelfth, Wolf claimed that his trial counsel was ineffective for failing to file a motion to suppress the evidence seized during an illegal search of his apartment. We conclude that Wolf failed to demonstrate that he was prejudiced by any failure on the part of his trial counsel to file a motion to suppress. Even assuming, without deciding, that a motion to suppress evidence had merit, Wolf did not establish that he would have insisted on going to trial rather than pleading guilty. Aside from the photographs, videotapes, and audiotapes obtained from Wolf's apartment, multiple witnesses testified at the grand jury proceeding that they observed Wolf engaging in sexual conduct with children under the age of fourteen, or were themselves victims of this conduct. Thus, Wolf did not demonstrate that his trial counsel was ineffective in this regard, and we affirm the order of the district court with respect to this claim.

Thirteenth, Wolf argued that his trial counsel was ineffective for failing to plan a "media strategy" or request a change of venue. We conclude that Wolf failed to demonstrate that he would not have pleaded guilty and would have insisted on going to trial if only his counsel had requested a change of venue. Further, there is no merit whatsoever to Wolf's claim that his counsel was deficient in failing to plan a "media

strategy" and use the media to Wolf's advantage. Thus, Wolf did not establish that his counsel was ineffective in this area, and the district court did not err in denying him relief.

Fourteenth, Wolf contended that his trial counsel was ineffective for failing to seek to have the court pay for investigative and expert services when Wolf was unable to pay for them. Wolf's trial counsel testified during the evidentiary hearing that he did not believe it was necessary to conduct additional investigation; further, he did not think that a psychological expert would assist Wolf's defense due to the substantial physical evidence. Because the district court's determination that this claim lacked merit was supported by substantial evidence and was not clearly wrong,²¹ we affirm the order of the district court with respect to this claim.

Fifteenth, Wolf claimed that his trial counsel was ineffective for allowing him to plead guilty when there was no evidence that he committed the crimes during the time period provided in the amended indictment. The district court did not err in denying Wolf relief on this claim. Wolf failed to demonstrate that he would not have pleaded guilty and would have insisted on going to trial if his counsel had specifically called his attention to the dates contained in the amended indictment.

²¹See Riley, 110 Nev. at 647, 878 P.2d at 278.

Thus, we conclude that Wolf did not establish that his trial counsel was ineffective on this issue.²²

Sixteenth, Wolf argued that his trial counsel was ineffective for failing to challenge his guilty plea as coerced due to improper threats by the State. Wolf contended that the State threatened to seek an indictment against him on thirty additional counts, even though there was not probable cause to do so. We conclude that this claim is without merit. A review of the record on appeal reveals that the State intended to seek an additional thirty-count indictment against Wolf based on thirty audiotapes that were recovered from his house. These audiotapes contained sexual conduct between the defendant and one of the victims. Because Wolf failed to demonstrate that the State did not have probable cause to seek a second indictment, he did not establish that his counsel was ineffective on this claim, and we affirm the order of the district court.

Seventeenth, Wolf alleged that his trial counsel was ineffective for giving him erroneous advice concerning his parole eligibility. A review of the record on appeal reveals that during the plea canvass, the district court explained to Wolf that he would be required to serve a

²²In his petition, Wolf raised multiple ineffective assistance of trial and appellate counsel claims based on the allegedly inaccurate dates contained in the amended indictment. The alleged error in the dates did not alter the crimes to which Wolf was pleading guilty; further, Wolf received a substantial benefit in pleading guilty to three counts rather than facing a possible conviction of all forty-two charged offenses. We therefore conclude that Wolf did not establish that he was prejudiced due to any inaccuracy in the dates contained in the amended indictment.

minimum of thirty years if the court imposed the sentences to run consecutively, and Wolf acknowledged that he understood this. Thus, Wolf failed to demonstrate that he was prejudiced by any erroneous advice his trial counsel gave him concerning parole eligibility, and the district court did not err in denying the claim.

Eighteenth, Wolf claimed that his trial counsel was ineffective for failing to present mitigating evidence at his sentencing hearing and failing to object to statements made by the district attorney and victims. We have reviewed the many specific claims of error Wolf raised with respect to his sentencing hearing, and conclude that he is not entitled to relief. At his sentencing hearing, the district court stated,

[t]he reason I ran these sentences consecutive, Mr. Wolf, is because you were originally charged with 42 counts in the indictment from the grand jury. And as you recall, you decided to accept the plea bargain because the State was ready to go to the grand jury and get 30 more counts. Now that figure adds up to 72 counts. And because of the seriousness of the offense and because of what happened, you got a good plea bargain as far as I'm concerned. This is the most I could give you. I wish I could give you more, but I could only give you three consecutive life sentences.

Wolf failed to demonstrate that the outcome of his sentencing hearing would have been different if his counsel had not made these alleged errors, and we therefore affirm the order of the district court with respect to this claim.

Nineteenth, Wolf contended that his trial counsel was ineffective for failing to challenge the fact that the Division of Parole and

Probation failed to include exculpatory information in the pre-sentence investigation report (PSI). Further, Wolf argued that the PSI should have contained an explanation of the circumstances concerning the commission of the offenses. We conclude that Wolf failed to demonstrate that the outcome of his sentencing hearing would have been different if his counsel had raised these challenges. Consequently, the district court did not err in denying this claim.

Twentieth, Wolf claimed that his trial counsel was ineffective because he labored under an actual conflict of interest. Specifically, Wolf argued that his trial counsel worked with the State to secure a conviction although there was no evidence he committed the crimes. Wolf did not adequately support his claim that his trial counsel joined with the State to convict him; his trial counsel testified that he encouraged Wolf to accept the plea offer because, "[t]here was a very strong possibility he would have been convicted of a very large number of [the 42] counts." We conclude that Wolf failed to demonstrate that his trial counsel labored under an actual conflict of interest, and we affirm the order of the district court with respect to this claim.

Twenty-first, Wolf contended that his trial counsel was ineffective for failing to file a notice of appeal. "[T]here is no constitutional requirement that counsel must always inform a defendant who pleads guilty of the right to pursue a direct appeal" unless the defendant inquires about a direct appeal or there exists a direct appeal claim that has a

reasonable likelihood of success.²³ Here, Wolf failed to demonstrate the existence of either of the above conditions. Moreover, Wolf filed a timely proper person notice of appeal and was appointed counsel. Thus, he did not demonstrate that he was prejudiced by his trial counsel's actions. As such, Wolf did not establish that his trial counsel was ineffective on this claim, and we affirm the order of the district court.

Wolf next raised several claims of ineffective assistance of appellate counsel. To demonstrate ineffective assistance of appellate counsel, a petitioner must show that counsel's performance fell below an objective standard of reasonableness, and the deficient performance prejudiced the defense.²⁴ "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."²⁵ Appellate counsel is not required to raise every non-frivolous issue on appeal.²⁶

First, Wolf claimed that his appellate counsel was ineffective for failing to argue that the district court erred in allowing the indictment to be amended by the district attorney rather than the grand jury.

²³Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999).

²⁴See Strickland, 466 U.S. 668; Kirksey, 112 Nev. 980, 923 P.2d 1102.

²⁵Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

²⁶Jones v. Barnes, 463 U.S. 745, 751 (1983).

However, both Wolf and his trial counsel consented to this action. Therefore, this issue would not have had a reasonable probability of success on appeal, and we affirm the district court's denial of this claim.

Second, Wolf contended that his appellate counsel was ineffective for failing to challenge various aspects of the victim impact statements presented at his sentencing. We conclude that this claim is similarly meritless. NRS 176.015(3) permits the victim to express views concerning the crime, the person responsible, as well as the impact of the crime. Wolf failed to demonstrate that an appeal of this issue would have had a reasonable likelihood of success. As such, Wolf did not establish that his appellate counsel was ineffective on this issue.

Third, Wolf alleged that his appellate counsel was ineffective for failing to challenge the district court's reliance on uncharged crimes to punish him. However, the guilty plea agreement provided that, "I also understand that information regarding charges not filed, dismissed charges, or charges to be dismissed pursuant to this agreement may be considered by the judge at sentencing." Thus, Wolf did not establish that the district court's consideration of thirty uncharged-crimes in determining Wolf's sentence was improper, and we affirm the order of the district court with respect to this claim.

Fourth, Wolf claimed that his appellate counsel was ineffective for failing to challenge the fact that he was not given a psychosexual evaluation prior to sentencing, in violation of NRS 176.139. However,

NRS 176.139 did not apply to offenses committed before October 1, 1997.²⁷ As the offenses to which Wolf pleaded guilty occurred prior to that date, he failed to demonstrate that he was entitled to a psychosexual evaluation. Therefore, Wolf did not establish that his appellate counsel was ineffective on this issue, and we affirm the order of the district court with respect to this claim.

Fifth, Wolf contended that his appellate counsel was ineffective for failing to raise all of his direct appeal claims as violations of the United States Constitution. Wolf failed to articulate how this prejudiced his direct appeal. As such, he is not entitled to relief on this claim, and we affirm the order of the district court.

Sixth, Wolf alleged that his appellate counsel was ineffective for failing to file supplemental information while his direct appeal was pending with this court. Specifically, Wolf asked his appellate counsel to inform this court that his PSI contained inaccurate information concerning his criminal history. On direct appeal, this court rejected Wolf's contention that the district court relied on an inaccurate PSI. In denying Wolf relief, this court noted that the district court's decision to run the sentences consecutively was based on the number of dismissed and uncharged counts. We conclude that Wolf failed to demonstrate that a supplement concerning his criminal history would have altered the outcome of this issue on appeal. As such, Wolf did not establish that his

²⁷See 1997 Nev. Stat., ch. 449, § 8, at 1640.

appellate counsel was ineffective on this claim, and we affirm the order of the district court.

Seventh, Wolf argued that his appellate counsel was ineffective for failing to raise the claim that he was actually innocent. We conclude that Wolf did not demonstrate that this claim had a reasonable likelihood of success on appeal. Wolf pleaded guilty pursuant to Alford, and in doing so, maintained his innocence.²⁸ Wolf acknowledged that he was pleading guilty because he believed he would be found guilty if he went to trial, and was attempting to avoid a harsher punishment. Further, the evidence offered by the State at the entry of Wolf's plea provided a strong factual basis to support the plea. Thus, Wolf failed to establish that his appellate counsel was ineffective on this issue, and the district court did not err in denying the claim.

Eight, Wolf contended that his appellate counsel was ineffective for failing to raise the allegations of ineffective assistance of trial counsel that Wolf claimed in the instant petition. However, such claims are not generally appropriately raised on direct appeal.²⁹ Thus, Wolf did not establish that his appellate counsel was ineffective in this regard, and we affirm the order of the district court.

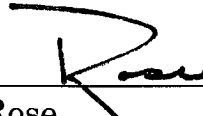
²⁸See Hargrove, 100 Nev. at 503, 686 P.2d at 226 (providing that a claim of innocence by defendant who pleaded guilty pursuant to Alford was "essentially academic").

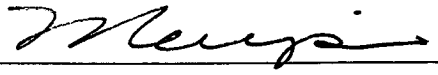
²⁹See Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).


Finally, Wolf raised various claims concerning alleged district court error. However, these claims are outside the scope of a post-conviction petition for a writ of habeas corpus when the conviction is the result of a guilty plea.³⁰ As such, the district court did not err in denying these claims.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Wolf is not entitled to relief and that briefing and oral argument are unwarranted.³¹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.³²


_____, J.
Rose


_____, J.
Maupin


_____, J.
Douglas

³⁰See NRS 34.810(1)(a).

³¹See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

³²We have reviewed all documents that Wolf has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that Wolf has attempted to present claims or facts in those submissions that were not previously presented in the proceedings below, we have declined to consider them in the first instance.

cc: Hon. Lee A. Gates, District Judge
Gregory Lee Wolf
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Hinds & Morey
Clark County Clerk